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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL PHIPPS,

Defendant and Appellant.

D073162

(Super. Ct. Nos. SCD269831,
SCN369096)

APPEAL from a judgment of the Superior Court of San Diego County, Michael S. Groch, Judge. Affirmed.

Britton Donaldson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Seth Friedman and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

After a crime spree, defendant Paul Phipps entered into a plea agreement with a San Diego prosecutor in which he pleaded guilty to being a felon in possession of a

firearm and two other felonies. His sentence for unlawful possession of a firearm ran concurrently with his term on another state felony. Phipps was also charged in federal court with being a felon in possession of a firearm for the same conduct underlying the state charge. Phipps pleaded guilty to the federal offense as well and received a sentence that was consecutive to his state sentence.

Phipps's counsel filed an appellate brief pursuant to *Wende* and *Anders*,¹ identifying two appellate issues that counsel had considered, but not briefed: (1) whether he was correctly convicted in state court for the same offense he was convicted of in federal court, viz., being a felon in possession of a firearm; and (2) whether his custody credits were correct. We directed counsel to brief both issues and to supply the court with the federal documents supporting his claim of double jeopardy. After a full review, we affirm the judgment without prejudice to Phipps's filing a petition for writ of habeas corpus claiming ineffective assistance of counsel if warranted.

BACKGROUND

On October 20, 2016, Phipps went into a jewelry store and stole jewelry worth nearly \$30,000. A few weeks later, on November 8, Phipps went into a gun store and stole a Ruger P345 handgun.

¹ *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*); *Anders v. California* (1967) 386 U.S. 738 (*Anders*).

The District Attorney of San Diego filed a complaint in case number SCD269831 charging Phipps with grand theft of personal property (Pen. Code,² § 487, subd. (a)), possession of a firearm by a felon (§ 29800, subd. (a)(1)), and grand theft of a firearm (§ 478, subd. (a)(1)). The complaint alleged that Phipps had three prior convictions for which he had served a term in prison. (§§ 667.5, subd. (b), 668.) Phipps was arrested, arraigned, and released on bail.

On January 29, 2017, while out of custody on bail, Phipps was caught taking or driving a stolen car. The district attorney filed a complaint, case number SCN369096, charging Phipps with unlawfully taking and driving a car while out of custody on bail (Veh. Code, § 10851, subd. (a); § 12022.1, subd. (b)), receiving stolen property while out of custody on bail (§§ 496d, 12022.1, subd. (b)), and possession of burglary tools (§ 466).

On February 8, 2017, in case number USDC 17-CR-00330-BEN, the United States Attorney for the Southern District of California indicted Phipps on the charge of being a felon in possession of a firearm that had traveled in interstate commerce, in violation of title 18 of the United States Code section 922(g)(1). This crime arose from the same act alleged in the state complaint — possession of a firearm on November 8, when he stole a handgun from the gun store. The federal prosecutor charged the crime as a continuing offense from November 8 through December 12, 2016, when Phipps turned the stolen gun in to the San Diego Police. Phipps was taken into federal custody on March 1, 2017,

² Further statutory references are to the Penal Code unless otherwise specified.

and remained in federal custody thereafter. Phipps pleaded guilty to this federal charge on April 11, 2017.

Phipps entered into a plea bargain with the state prosecutor on August 28, 2017, resolving all the state charges against him. He pleaded guilty to grand theft and unlawful possession of a firearm in case number SCD269831, and to stealing a car while out on bail in case number SCN369096. The remaining charges were dismissed. The state sentence was to run consecutively to whatever sentence Phipps received in federal court. On September 27, the trial court sentenced Phipps to a total term of four years eight months in accordance with the plea agreement. In SCD269831, the court imposed the middle term of two years in prison for grand theft and a concurrent term of two years for unlawful possession of a firearm. In SCN369096, the court sentenced Phipps to a consecutive term of eight months for taking a car with an enhancement of two years for committing the crime while out on bail.

Phipps was sentenced in federal court in October 2017 to a term of 36 months for his unlawful possession of a firearm by a felon. As noted, this sentence was consecutive to the state sentence.

DISCUSSION

1. *Double Jeopardy*

a. *Fifth Amendment Double Jeopardy Clause*

The Fifth Amendment of the federal Constitution prohibits double jeopardy, protecting against multiple prosecutions after either a conviction or an acquittal and against multiple punishments for the same offense. (*Puerto Rico v. Sanchez Valle* (2016))

__ U.S. __ [136 S.Ct. 1863, 1870] (*Sanchez-Valle*); *People v. Gonzalez* (2015) 241 Cal.App.4th 1103, 1112 (*Gonzalez*).)

Phipps was convicted in state court of violating section 29800, subdivision (a)(1)³ and in federal court of violating section 922(g)(1)⁴ of title 18 of the United States Code. The two code sections have the same basic elements of the crime: unlawful possession of a firearm by a felon. Jeopardy can attach " 'if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution.' " (*People v. Comingore* (1977) 20 Cal.3d 142, 146 (*Comingore*).)

Phipps appeared at the state preliminary hearing in federal custody dress and the prosecutor asked for a time waiver "pending his federal case" for being a felon in possession of a firearm. Nonetheless, Phipps did not raise a defense of double jeopardy in the state trial court.

The federal double jeopardy clause does not prevent dual prosecutions by two different sovereigns for the same offense even when it is based on the same act. The state

³ Section 29800, subdivision (a)(1) provides that: "Any person who *has been convicted of*, or has an outstanding warrant for, *a felony* under the laws of the United States [or] the State of California, . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony." (Emphasis added.)

⁴ Section 922(g)(1) of title 18 of the United States Code states:
"(g) It shall be unlawful for any person
"(1) who *has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year, . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition* which has been shipped or transported in interstate or foreign commerce." (Emphasis added.)

and federal governments are two different sovereigns under this separate-sovereign doctrine. (*Sanchez-Villa, supra*, 136 S.Ct. at p. 1870; *Heath v. Alabama* (1985) 474 U.S. 82, 88.)⁵ Therefore, Phipps's federal and state convictions for unlawfully possessing a firearm on November 8, 2016, do not violate the double jeopardy clause of the federal Constitution.

b. *State Statutory Protection*

Although there is no federal constitutional violation, California provides greater protection against multiple prosecutions by way of statute. (*Vega-Robles, supra*, 9 Cal.App.5th at p. 426; *Comingore, supra*, 20 Cal.3d at p. 145; *People v. Belcher* (1974) 11 Cal.3d 91, 97 (*Belcher*).) Section 656 bars successive convictions and section 793 prohibits successive prosecutions.⁶ (*People v. Homick* (2012) 55 Cal.4th 816, 842; *Comingore*, at p. 148.) The difference in wording in these two statutes is of no legal significance because they provide the same protection to defendants. (*Comingore*, at

⁵ This issue is currently pending before the United States Supreme Court. (*Gamble v. United States* (11th Cir. 2017) 694 Fed.Appx. 750, cert. granted June 28, 2018, No. 17-646, __ U.S. __ [138 S.Ct. 2707].) In the meantime, the separate-sovereign doctrine applies. (See, e.g., *Sanchez-Valle*, at p. 1871; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 426 (*Vega-Robles*).)

⁶ Section 656 provides, "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or territory of the United States based upon the act or omission in respect to which he or she is on trial, he or she has been acquitted or convicted, it is a sufficient defense."

Section 793 provides, "When an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state."

p. 148.) The statutory prohibitions are triggered by a prior criminal prosecution for the same act or conduct. (*Gonzalez, supra*, 241 Cal.App.4th at p. 1112.) Under these statutes, a defendant may not be convicted in California after a prior conviction in another jurisdiction if, as here, all the acts constituting the offense in California were necessary to prove the offense in the other prosecution. (*Vega-Robles, supra*, 9 Cal.App.5th at p. 427.)

The state statutory protection against double jeopardy is an affirmative defense that must be pleaded, however. (§§ 1016 & 1017⁷; *People v. Williams* (1999) 21 Cal.4th 335, 344; *Belcher, supra*, 11 Cal.3d at p. 96.) Phipps never asserted a double jeopardy claim in the trial court and thus has forfeited any state claim.⁸ (*Williams*, at pp. 343–344 [contrasting double jeopardy, which is forfeited, with the statute of limitations defense,

⁷ Section 1016 provides "[t]here are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction:

"[¶] . . . [¶]

"4. A former judgment of conviction or acquittal of the offense charged.

"5. Once in jeopardy."

Section 1017 states in part that: "Every plea must be made in open court and, may be oral or in writing . . . in substantially the following form:

"[¶] . . . [¶]

"3. If he or she plead a former conviction or acquittal: 'The defendant pleads that he or she has already been convicted (or acquitted) of the offense charged, by the judgment of the court of _____ (naming it), rendered at _____ (naming the place), on the _____ day of _____.'

"4. If he or she plead once in jeopardy: 'The defendant pleads that he or she has been once in jeopardy for the offense charged (specifying the time, place, and court)."

⁸ We do not minimize the stigma of Phipps's incurring an additional felony conviction, but note that his sentence would not be shortened even if the state conviction were reversed, because the punishment for being in possession of a firearm in the state court ran concurrently with the term imposed for his grand theft conviction.

which cannot be forfeited]; *People v. Scott* (1997) 15 Cal.4th 1188, 1201 (*Scott*) [double jeopardy defense subject to forfeiture].)

We conclude there is no violation of the double jeopardy clause of the Fifth Amendment and Phipps has forfeited any state statutory claims that he may have.

2. *Custody Credits*

Phipps requests that he receive credits for his time served in federal prison because it was served for the same conduct for which he was convicted in state court. Phipps has the burden of proving any error in the credits awarded at sentencing. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191 (*Bruner*); *People v. Mendez* (2007) 151 Cal.App.4th 861, 864.) He has not met his burden. We conclude Phipps is not entitled to custody credits on his state sentence for time served in federal custody because he received separate, consecutive sentences for the state and federal offenses. (§ 2900.5, subd. (b).)

The federal authorities took Phipps into custody on March 1, 2017, on the single charge of possession of a firearm by a felon. Phipps was in federal custody from March 1 through the date of his state sentencing, September 27, 2017. The court did not grant credit for Phipps's federal custody, however, and granted credit only for the days that Phipps was in custody attributable to the two state cases. Phipps received credit for 11 actual days and 10 days under section 4019. Phipps did not object to not receiving custody credits for his time in federal custody.

Phipps relies on section 2900.5, which states in subdivision (a) that a defendant is entitled to credit for all days of custody upon his term of imprisonment, and in subdivision (b) that "credit shall be given only where the custody to be credited is

attributable to proceedings related to the same conduct for which the defendant has been convicted." Subdivision (b) goes on to state that "[c]redit shall be given only once for a single period of custody attributable to multiple offenses for which a *consecutive sentence* is imposed." (§ 2900.5, subd. (b), emphasis added; *People v. Santa Ana* (2016) 247 Cal.App.4th 1123, 1135 (*Santa Ana*).)

Because both California and the federal government specified that the state and federal sentences would be consecutive, it would be an improper windfall to give Phipps credit on two consecutive sentences for one period of pretrial custody. (*Bruner, supra*, 9 Cal.4th at p. 1191; *Santa Ana, supra*, 247 Cal.App.4th at p. 1144; § 2900.5, subd. (b).)

DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.